Supreme Court, U.S.
FILED
MAY 12 2003
OFFICE OF THE CLERK

(4)

No. 02-1403

IN THE

Supreme Court of the United States

Marvin and Lynn St. Germain, *et al.*,
Petitioners,

v.

U.S. Home Corporation

On Petition for a Writ of Certiorari
to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Barry C. Vaughan
KASDAN, SIMONDS, RILEY & VAUGHAN LLP
2600 Michelson Drive, Tenth Floor
Irvine, CA 92612-6510

May 9, 2003

12 1/2

TABLE OF CONTENTS

		Pages
I.	INTRODUCTION	1
II.	HOME BUYERS HAVE BEEN DENIED DUE PROCESS AND THEIR RIGHTS UNDER CALIFORNIA LAW	2-4
III.	THE COURT SHOULD EXERCISE ITS AUTHORITY TO REVIEW THE MATTER AT THIS STAGE OF THE PROCEEDINGS	4
IV.	CONCLUSION	7

TABLE OF AUTHORITIES

Cases **Pages**

Allied-Bruce Terminix Companies, Inc. v. Dobson
513 U.S. 1 (1994) 4

Cohen v. Beneficial Industrial Loan Corp.
337 U.S. 541, 546 (1949) 5

Connor v. Great Western Sav. & Loan Assn.
69 Cal.2d 850, 867 (1968) 3

Cox Broadcasting Corp. v. Cohn
420 U.S. 469, 479 (1975) 4

Crouchman v. Superior Court
45 Cal.3d 1167, 1173 (1988) 2

Franchise Tax Board of California v. Hyatt
___ U.S. ___ 1233 S. Ct. 409, 154
L.Ed. 2d 289 (*2003) 5

Gillespie v. United States Steel Corp.
379 U.S. 148, 152-153 (1964) 5

IAPMO v. Cal. Building Standards Comm.
55 Cal.App.4th 245, 248 (1997) 3

Moncharsh v. Heily & Blase
3 Cal.App. 1, 12 (1992) 2

Pierce County, Washington v. Guillen
___ U.S. ___ 123 S. Ct. 720, 728, 154
L.Ed.2d 610, 623 (Jan. 2003) 4,6

Cases **Pages**

Radio Station WOW, Inc. v. Johnson
362 U.S. 120, 124 5

Southland v. Keating
465 U.S. 1 (1984) 4

Statutes **Pages**

Cal. Const., art. I §16 25

Cal. Health and Safety Code §17921(a) 3

Cal. Health and Safety Code §17957 3

Cal. Health and Safety Code §17995 3

Cal. Health and Safety Code §17995.1 3

Cal. Health and Safety Code §19825 3

Cal. Health and Safety Code §19826 3

Cal. Health and Safety Code §19835 3

Cal. Business and Professions Code §5510 3

Cal. Business and Professions Code §5536 3

Cal. Business and Professions Code §6710 3

Cal. Business and Professions Code §7000.5 3

Cal. Business and Professions Code §7028 3

Cal. Business and Professions Code §7071.5 3

Statutes	Pages

Cal. Code of Civil Procedure §1298.7 . . . . . 3, 4

Cal. Code of Civil Procedure §337.1 4

Cal. Code of Civil Procedure §337.15 4

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Marvin Jr. and Lynn St. Germain, *et. al.* ("Home Buyers") respectfully submit their Reply to the Brief by U.S. Home Corporation ("US Home) to their Petition for a Writ of Certiorari:

I. INTRODUCTION

US Home addresses only technical issues in its Opposition to Home Buyers' Petition for Writ of Certiorari, and does not address the merits of the compelling issues presented for review. Home Buyers' Petition invokes concerns regarding the denial of their right to jury trial and right to appeal, striking at the very heart of due process concerns. The issues presented are of compelling interest to consumers throughout the nation, who are faced with adhesive arbitration clauses, imposed by large corporate entities, leaving them without any meaningful ability to negotiate the terms.

It is submitted, therefore, that the Court should exercise its authority to review the issue on the merits, and expeditiously resolve this matter of national concern.

II. HOME BUYERS HAVE BEEN DENIED DUE PROCESS AND THEIR RIGHTS UNDER CALIFORNIA LAW

US Home's position is that Home Buyers, who are currently living in homes with serious defects, injurious to their health and safety, and which are continuing to deteriorate, should be forced to give up their right to trial by jury and appeal, without any chance at meaningful review, until such time as they jump through myriad hoops: First following through with the

mediation/arbitration process,[1] then reducing the award to a judgment, then appealing the ruling on the order compelling arbitration to an intermediate court of appeal, and finally petitioning the California Supreme Court for a Writ of Review before proceeding to petition for writ of certiorari to this Court. (And, if successful in the U.S. Supreme Court, starting the process all over at the state trial court level.) The final resolution of this matter would be further complicated for Home Buyers, as they would concurrently be required to pursue their claims against subcontractor and design professionals, who are not parties to the arbitration agreement, in state court. (Petitioners' Brief at pages 4, 8.)

It is unquestionable that absent the arbitration clause in the contract Home Buyers would be eligible to a trial by jury on their numerous fact-based claims. The right to trial in California is inviolate. Cal. Const., art. I, § 16; *Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173.

Moreover, leaving the trial court's decision compelling arbitration intact effectively denies Home Buyers any right to meaningful appeal on the merits of their case. Under California law, the right to appeal after an arbitration award is so highly circumscribed as to sanction a virtual miscarriage of justice. *Moncharsh v. Heily & Blase* (1992) 3 Cal.App. 1, 12 ("With narrow

---

[1] In fact, not only does the arbitration clause at issue involve an arbitration process, it contemplates a two-part process before an arbitrator's award could be reduced to an appealable judgment: First a mediation in accordance with the rules of the Commercial Mediation Rules of the American Arbitration Association, and then, if not resolved, resolution of the claim in accordance with the Commercial rules of the American Arbitration Association. (Petitioner's Brief at page 2.)

exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.")

California has evinced a strong interest in ensuring the integrity of new homes purchased by residents of this state. See, e.g. *Health and Safety Code* sections 17921(a), 17957, 17995, 17995.1, 19825, 19826, and 19835; *Business and Professions Code* sections 5510, 5536, 6710, 7000.5, 7028, 7071.5; *IAPMO v. Cal. Building Standards Comm.* (1997) 55 Cal.App. 4th 245, 248 (stating: "There is no question that regulation of the building industry is an appropriate exercise of the state's police power.").

California courts have also recognized this interest: As stated in *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 867:

> A home is not only a major investment for the usual buyer but also the only shelter he has. *Hence it becomes doubly important to protect him against structural defects that could prove beyond his ability to remedy.* (emphasis added.)

This concern for protecting California purchasers of these major investment items is reflected by the California legislature's action (like that of legislatures in numerous other states) in enacting Code of Civil Procedure section 1298.7, which renders arbitration

agreements unenforceable in actions involving defective residential construction.[2]

Unfortunately, California courts have felt constrained by this Court's rulings in *Allied-Bruce Terminix Companies, Inc. v. Dobson* 513 U.S. 265 (1994) and *Southland v. Keating* 465 U.S. 1 (1984) to enforce arbitration clauses in defective residential construction cases, denying home buyers the very protection the legislature intended, and allowing large developers to strip their customers of the right to trial by jury guaranteed them under state law.

III. THE COURT SHOULD EXERCISE ITS AUTHORITY TO REVIEW THIS MATTER AT THIS STAGE OF THE PROCEEDINGS.

US Home cites only to *Pierce County, Washington v. Guillen*, __U.S.__, 123 S.Ct. 720, 728, 154 L.Ed.2d 610, 623 (Jan. 2003) as U.S. Supreme Court authority for the proposition that the petition for writ of certiorari is premature. *Pierce County* relies on an earlier Court ruling, *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469, 479 (1975), which elucidated a principle of flexibility in determining the "finality" of judgments for the purposes of Supreme Court review on certiorari.

This Court, in *Cox* proclaimed that the finality of judgments rule should not be "mechanically" applied:

"'[O]ur cases long have recognized that

---

[2] Code of Civil Procedure section 1298.7 incorporates lawsuits of this nature by reference to actions governed by Code of Civil Procedure sections 337.1 and 337.15, which define actions involving defective construction which are subject to special statutes of limitation.

> whether a ruling is "final" within the meaning of § 1292 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction." (Citing *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-153 (1964) [internally citing *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541, 546 [1949]].)

The Court in *Cox* also recognized that the fact that additional proceedings may be pending in the state court is not conclusive, when "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and delayed justice.'" *Id.* at 478-479 (citing *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124.)

While in *Cox* the Court recognized four distinct exceptions to the rule of finality, these should not be regarded as exclusive. In fact, the Court spoke of the cited exceptions in non-exclusive language, referring to "***at least*** four categories" in which the Court, to that date, had taken jurisdiction without awaiting the full completion of proceedings in the lower state courts. *Id.* at 478. (emphasis added.)[3]

---

[3] In fact, only recently, albeit without jurisdictional discussion, the Court, in *Franchise Tax Board of California v. Hyatt*, __U.S.__, 123 S. Ct. 409, 154 L.Ed. 2d 289 (*2003)

The gravamen of the Court's ruling in *Guillen* is distinguishable from that in the instant case. The issue in *Guillen* involved a mere discovery dispute. The Court found that Pierce County would still have its day in court and that the discovery dispute was not necessarily determinative of the outcome in that case. *Guillen, supra.* 123 S.Ct at 728 n.5. Here, in contrast, Home Buyers will not get their "day in court" but will be compelled to follow a tortuous and labyrinthine path designed to exclude them from the court. They will be compelled to arbitrate the substantive issues without any right to trial by jury or to appeal on the merits of the factual and legal issues presented but only be able, absent extraordinary error or misfeasance by the arbitrator, to raise whether the order compelling arbitration, which this Court can review now, was proper.

As set forth above, awaiting finality, in the strict sense, in the instant matter would be a waste of economic and judicial resources, in light of the tortuous path involved to achieve review by certiorari. The harm in this case is exacerbated by the fact that Home Buyers are unable to make needed repairs to their domiciles in the interim, and are faced with the situation of giving up their valuable rights to trial by jury and appeal in order to achieve a faster, but potentially unsatisfactory, and possibly unjust resolution., with no further judicial recourse on the merits of the case, without immediate U.S. Supreme Court involvement.

---

reviewed a decision of the Nevada Supreme Court on a grant of certiorari, where a petition for writ of mandamus was granted in part and denied in part, leaving intentional tort claims intact for trial in the lower court.

IV. CONCLUSION

Home Buyers, by their Petition for Certiorari, have asked this Court to resolve an issue of great importance to California home purchasers, and home buyers nationwide, who are faced with a loss of due process rights, which, in this case, the California State Legislature has sought to protect. It is respectfully submitted that this Court should intervene at this stage in the proceedings, and grant certiorari so that the matter may be decided on the merits.

Respectfully submitted,

Barry C. Vaughan
KASDAN, SIMONDS, RILEY &
VAUGHAN LLP
2600 Michelson Drive, Tenth Floor
Irvine, CA 92612-6510

May 9, 2003